

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**  
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4       Jess Guy Anscott,

5                   Petitioner

6       v.

7       Brian Williams, et al.,

8                   Respondents  
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2:13-cv-01833-JAD-VCF

**Order Dismissing Petition and Closing  
Case**

[ECF No. 11]

10           Pro se petitioner Jess Guy Anscott—an adjudicated habitual criminal—is on parole after  
11 serving ten years in prison for pleading guilty to possessing a stolen vehicle.<sup>1</sup> He petitions for a  
12 writ of habeas corpus under 28 U.S.C. § 2254.<sup>2</sup> Anscott forever abandoned his unexhausted  
13 claims,<sup>3</sup> so I now review his remaining claims on their merits. I find that they are meritless, so I  
14 dismiss his petition with prejudice.

15                                   **Background**

16           Anscott accepted a plea bargain in one of three concurrent criminal cases that he had  
17 pending. Under the plea agreement, he pled guilty to one count of felony possession of a stolen  
18 vehicle<sup>4</sup> and stipulated to a 5–12 1/2-year sentence under the “small” Nevada habitual criminal  
19 statute in all three state-court cases.<sup>5</sup> The State did not oppose Anscott being released from  
20 custody pending sentencing, but the plea agreement imposed a 10-years-to-life sentence under  
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23       <sup>1</sup> ECF No. 11 at 2.

24       <sup>2</sup> ECF No. 11.

25       <sup>3</sup> ECF No. 29.

26       <sup>4</sup> ECF Nos. 16-17, 16-18, and 16-19.

27       <sup>5</sup> ECF No. 16-19 at 2.  
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1 the “large” Nevada habitual criminal statute if he failed to appear for sentencing.<sup>6</sup> Anscott failed  
2 to appear, so he was held to his agreement.<sup>7</sup> He challenged his conviction in the state courts on  
3 direct appeal and post-conviction review.

#### 4 **Standard of Review**

5 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly  
6 deferential” standard for evaluating a state court’s decision to deny a petition for habeas corpus  
7 on its merits.<sup>8</sup> A federal court may not grant habeas relief merely because it might conclude that  
8 the state court’s decision was incorrect.<sup>9</sup> The federal district court may grant relief only if the  
9 state court’s decision was: (1) contrary to or an unreasonable application of clearly established  
10 U.S. Supreme Court law; or (2) was based on an unreasonable determination of the facts in light  
11 of the evidence presented at the state-court proceeding.<sup>10</sup>

12 A state court’s decision is contrary to clearly established law only if it applies a rule that  
13 contradicts the governing law or if the decision confronts a set of facts that are materially  
14 indistinguishable from a Supreme Court decision and nevertheless arrives at a different result.<sup>11</sup>  
15 A state court need not even be aware of Supreme Court precedents, as long as neither the  
16 reasoning nor the result of its decision contradicts them.<sup>12</sup> “A federal court may not overrule a  
17 state court for simply holding a view different from its own, when the precedent from [the  
18 Supreme] Court is, at best, ambiguous.”<sup>13</sup> And when a state court’s factual findings are

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20 <sup>6</sup> *Id.* at 2–3.

21 <sup>7</sup> ECF Nos. 16-20, 16-21, 17-19 and 17-24.

22 <sup>8</sup> *Cullen v. Pinholster*, 563 U.S. 170 (2011).

23 <sup>9</sup> *Id.* at 202.

24 <sup>10</sup> *Id.* at 181–88; *see also* 28 U.S.C. § 2254(d).

25 <sup>11</sup> *See, e.g., Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003).

26 <sup>12</sup> *Id.*

27 <sup>13</sup> *Id.* at 16.

1 challenged, federal courts “must be particularly deferential” to those findings.<sup>14</sup> State-court  
2 factual findings are presumed to be correct unless the petitioner can rebut that presumption by  
3 clear and convincing evidence.<sup>15</sup> The petitioner bears the burden of proving by a preponderance  
4 of the evidence that he is entitled to habeas relief.<sup>16</sup>

## 5 **Discussion**

### 6 **A. Ground 1(a): Ineffective assistance of counsel—alleged coercion of guilty plea**

7 In ground 1(a), Anscott alleges that he was denied effective assistance of counsel in  
8 violation of the Sixth and Fourteenth Amendments because counsel coerced him into pleading  
9 guilty. Counsel allegedly misrepresented that Anscott would certainly receive large habitual-  
10 criminal treatment if convicted at trial. Anscott urges that counsel failed to advise him that the  
11 non-violent nature of his criminal history actually made large habitual-criminal treatment  
12 unlikely.<sup>17</sup>

13 Defense counsel Nadine Morton testified at the state post-conviction evidentiary hearing  
14 that she advised Anscott prior to his plea that: (1) “he was potentially facing habitual—it wasn’t  
15 mandatory habitual, but he was eligible for the large habitual, and we discussed the different  
16 options a judge had in sentencing him to the habitual”; (2) the sentencing judge in this particular  
17 one of the three cases would “generally not habitualize somebody for non-violent offenses,” but  
18 his separate counsel in his other two cases would have to address the sentencing tendencies of the  
19 judge in those cases; and (3) “he had to know that he was still at risk or jeopardy of, if we lost  
20 any one of the three trials, that he was eligible for the large habitual.”<sup>18</sup>

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23 <sup>14</sup> *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004); *see also* 28 U.S.C. § 2254(d)(2).

24 <sup>15</sup> 28 U.S.C. § 2254(e)(1).

25 <sup>16</sup> *Cullen*, 563 U.S. at 569.

26 <sup>17</sup> ECF No. 11 at 3–5.

27 <sup>18</sup> ECF No. 19-14 at 18–19.

1           The two-pronged test of *Strickland v. Washington*<sup>19</sup> applies to a challenge to a guilty plea  
2 based on alleged ineffective assistance of counsel.<sup>20</sup> A petitioner seeking to set aside a guilty  
3 plea due to ineffective assistance of counsel must demonstrate that: (1) his counsel’s performance  
4 fell below an objective standard of reasonableness; and (2) the defective performance resulted in  
5 actual prejudice.<sup>21</sup> On the performance prong, the question is not what counsel might have done  
6 differently but whether counsel’s decisions were reasonable from counsel’s perspective at the  
7 time; and I must start with a strong presumption that counsel’s conduct fell within the wide range  
8 of reasonable conduct.<sup>22</sup> On the prejudice prong, the petitioner must demonstrate a reasonable  
9 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
10 been different.<sup>23</sup> In the guilty-plea context, the petitioner “must show that there is a reasonable  
11 probability that, but for counsel’s errors, he would not have pleaded guilty and would have  
12 insisted on going to trial.”<sup>24</sup> This determination is “made objectively, without regard to the  
13 ‘idiosyncrasies of the particular decisionmaker.’”<sup>25</sup>

14           The Nevada Supreme Court’s rejection of Anscott’s claim was neither contrary to nor an  
15 unreasonable application of clearly established federal law. The Court held that Anscott “failed  
16 to demonstrate that [his trial] counsel’s performance was deficient or that he was prejudiced[,]”  
17 especially in light of his counsel’s testimony that she advised him on the possibility of large  
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20 <sup>19</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

21 <sup>20</sup> *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

22 <sup>21</sup> *Id.* at 58–59.

23 <sup>22</sup> *See, e.g., Beardslee v. Woodford*, 327 F.3d 799, 807–08 (9th Cir. 2003) (internal citation  
24 omitted).

25 <sup>23</sup> *Id.*

26 <sup>24</sup> *Hill*, 474 U.S. at 59.

27 <sup>25</sup> *Id.* at 60 (quoting *Strickland*, 466 U.S. at 695).

1 habitual-criminal treatment.<sup>26</sup> And Anscott “received a substantial benefit in pleading guilty”  
2 because the two charges of possessing a stolen vehicle were combined into one, and the State  
3 stipulated that it would seek lesser habitual-criminal treatment unless he violated the plea  
4 agreement. And, the Nevada Supreme Court added, Anscott failed to demonstrate that he would  
5 not have agreed to the plea bargain—and accepted all of its benefits—but for his counsel’s  
6 alleged errors.<sup>27</sup> Anscott therefore failed to satisfy either of the *Strickland* prongs. So, ground  
7 1(a) does not provide a basis for relief.

8 **B. Ground 1(b): Ineffective assistance of counsel—alleged exculpatory evidence**

9 In ground 1(b), Anscott alleges that he was denied effective assistance because his  
10 counsel failed to investigate exculpatory evidence establishing that he had permission to use a  
11 vehicle.<sup>28</sup> Anscott was originally charged in count 1 with possession of a 2005 Nissan that had  
12 been stolen from Jeanie Tatum, and in count 2 with possession of a 2004 Chinook motor home  
13 that had been stolen from Darol Cline.<sup>29</sup> Anscott pled guilty to a single count of possession of a  
14 stolen vehicle by possessing the Nissan “and/or” the Chinook motor home.<sup>30</sup>

15 Prior to sentencing, Anscott moved for a new trial on a number of grounds, including  
16 ineffective assistance of counsel and newly discovered evidence. Anscott presented a  
17 purportedly notarized document stating that Dana Spalding gave him permission to use the  
18 Chinook motor home in exchange for paying the rent for the mobile-home-park space and  
19 allowing her access to the motor home at any time.<sup>31</sup> The state district court denied the motion,  
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22 <sup>26</sup> ECF No. 20-17 at 3–4.

23 <sup>27</sup> *Id.*

24 <sup>28</sup> ECF No. 11 at 6–8.

25 <sup>29</sup> ECF Nos. 16-4, 16-11.

26 <sup>30</sup> ECF Nos. 16-18, 16-19.

27 <sup>31</sup> ECF No. 17-3.

1 and the Supreme Court of Nevada affirmed.<sup>32</sup>

2 On state post-conviction review, Anscott claimed that Morton was ineffective for failing  
3 to investigate the purportedly notarized permission slip. The Nevada Supreme Court rejected the  
4 claim, reasoning that Anscott had failed to demonstrate that counsel's performance was deficient  
5 or that he was prejudiced. Morton testified at the state-court evidentiary hearing that: (1) she  
6 attempted to locate Dana Spalding prior to Anscott's plea but was unable to find her;<sup>33</sup> (2)  
7 Spalding was not the owner of the motor home;<sup>34</sup> (3) there was evidence that both vehicles were  
8 "punched," i.e., the ignitions had been pulled so that they could be started without a key;<sup>35</sup> (4) the  
9 police reports reflected that Anscott made excited utterances at the time of his arrest indicating  
10 that he knew that the vehicle was stolen;<sup>36</sup> (5) relying on Spalding's testimony thus "would've  
11 been a major problem at trial" even if she could have been located, and Morton explained that  
12 issue to Anscott;<sup>37</sup> (6) she received the Spalding document from a relative of Anscott after he had  
13 been picked up on a bench warrant, which was after he failed to appear for sentencing<sup>38</sup> and (7)  
14 after she provided the document to the prosecution, she "was alerted that there was a problem"  
15 with the notary.<sup>39</sup>

16 In light of Morton's testimony, Anscott failed to demonstrate that she did not investigate  
17 a potential witness and failed to demonstrate a reasonable probability that he would not have

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18 <sup>32</sup> ECF Nos. 17-15 at 5, 18-17.

19 <sup>33</sup> ECF No. 19-14 at 20-21, 23-24.

20 <sup>34</sup> *Id.* at 21-22.

21 <sup>35</sup> *Id.* at 21, 25-26.

22 <sup>36</sup> *Id.* at 21.

23 <sup>37</sup> *Id.* at 22-24.

24 <sup>38</sup> *Id.* at 20, 24.

25 <sup>39</sup> *Id.* at 24. The State asserted at sentencing that the notary had no record of notarizing any  
26 document for Spalding and that her notary stamp and book had been stolen from a storage unit.  
27 ECF No. 17-19 at 7, 23.

1 pleaded guilty but for counsel’s alleged errors. And, “because the notarized document related  
2 only to the use of the motor home and the charge related to two stolen vehicles, [Anscott] could  
3 not demonstrate prejudice as he still would have been charged with possession of a stolen  
4 vehicle.”<sup>40</sup> So, the Nevada Supreme Court’s rejection of this claim was neither contrary to nor an  
5 unreasonable application of clearly established federal law.

6 While satisfying *Strickland*’s high bar is “never an easy task,” federal habeas review of a  
7 state court’s rejection of an ineffective-assistance claim is “doubly deferential” when reviewing  
8 counsel’s performance under AEDPA.<sup>41</sup> That is, the federal court must take a “highly  
9 deferential” look at counsel’s performance through the also “highly deferential” lens of §  
10 2254(d).<sup>42</sup> “The question is whether there is *any* reasonable argument that counsel satisfied  
11 *Strickland*’s deferential standard.”<sup>43</sup> Strategic choices made after a reasonable investigation are  
12 “virtually unchallengeable”; and a decision not to investigate further “must be directly assessed  
13 for reasonableness in all of the circumstances, applying a heavy measure of deference to  
14 counsel’s judgments.”<sup>44</sup>

15 There is a reasonable argument that Morton satisfied *Strickland*’s deferential standard.  
16 She tried—but was unable—to locate Spalding before Anscott pled to the single possession-of-a-  
17 stolen-vehicle charge. And she reasonably decided that the “notarized” letter would do more  
18 harm than good. So, it was not unreasonable for the Nevada Supreme Court to conclude that  
19 Anscott failed to demonstrate that Morton was deficient in representing him. The Court also held  
20 that Anscott could not demonstrate prejudice. Anscott pled guilty to possession of a stolen  
21 vehicle by possessing the 2005 Nissan “and/or” the 2004 Chinook motor home. Even if the  
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23 <sup>40</sup> ECF No. 20-17 at 4.

24 <sup>41</sup> *Cullen*, 563 U.S. at 190, 202.

25 <sup>42</sup> *Id.*

26 <sup>43</sup> *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (emphasis added).

27 <sup>44</sup> *Strickland*, 466 U.S. at 690–91.

1 notarized letter could have successfully challenged the charge with respect to the Chinook motor  
2 home, it would do nothing to the charge with respect to the Nissan and would not change the  
3 ultimate conviction. The Court’s holding that Anscott failed to satisfy either *Strickland* prong  
4 was therefore not an unreasonable application of the law. Ground 1(b) does not provide a basis  
5 for relief.

6 **C. Ground 1(c): Ineffective assistance of trial counsel—communication**

7 In ground 1(c), Anscott alleges that he was denied effective assistance because Morton  
8 failed to communicate with him while preparing a defense.<sup>45</sup> The state district court denied the  
9 claim because “Anscott [did] not explain how communicating with his trial counsel would have  
10 resulted in a more favorable outcome. ‘Bare’ and ‘naked’ allegations are not sufficient, nor are  
11 those belied and repelled by the record.”<sup>46</sup> The Nevada Supreme Court did not explicitly address  
12 this claim separate and apart from Anscott’s other claims, but its implicit rejection was neither  
13 contrary to nor an unreasonable application of *Strickland*. The Nevada Supreme Court was only  
14 required to give this claim as much attention as Anscott did, and because Anscott did not even  
15 attempt to satisfy *Strickland*, it was not unreasonable for the Nevada Supreme Court to  
16 summarily reject the claim. This claim—without any facts to support it—does not establish a  
17 viable basis for habeas relief.

18 **D. Ground 2(a): Ineffective assistance of appellate counsel**

19 In the exhausted portion of ground 2(a), Anscott alleges that his appellate counsel was  
20 ineffective because counsel failed to file a copy of the plea canvass and therefore failed to  
21 adequately support Anscott’s claims on direct appeal.<sup>47</sup> The Nevada Supreme Court rejected this  
22 claim because Anscott “failed to demonstrate prejudice, as he [did] not identify the issues that  
23 appellate counsel should have raised and did not explain how any issues would have been  
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25 <sup>45</sup> ECF No. 11 at 9.

26 <sup>46</sup> ECF No. 20-1 at 6 (citing to *Hargrove v. State*, 686 P.2d 222, 224 (Nev. 1984)).

27 <sup>47</sup> ECF No. 11 at 13.



1 successful had appellate counsel provided transcripts on appeal.”<sup>48</sup>

2 The Court’s rejection of the bare and unsupported claim presented on post-conviction  
3 appeal was neither contrary to, nor an unreasonable application of, clearly established federal  
4 law. Federal court review is limited to the record before the state court that adjudicated the claim  
5 on the merits.<sup>49</sup> The state court’s determination that Anscott failed to demonstrate prejudice on  
6 the record before it was not an unreasonable application of *Strickland*. Ground 2(a) does not  
7 provide a basis for relief.

### 8 Conclusion

9 Accordingly, IT IS HEREBY ORDERED that Anscott’s petition for a writ of habeas  
10 corpus [ECF No. 11] is **DENIED** on its merits, and **this action is DISMISSED** with prejudice.  
11 Because reasonable jurists would not find my decision to be debatable or wrong, I decline to  
12 issue a certificate of appealability. The **Clerk of Court** is directed to **ENTER JUDGMENT in**  
13 **favor of respondents and against Anscott, DISMISS this action with prejudice, and CLOSE**  
14 **THIS CASE.**

15 DATED: March 8, 2018.

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17 U.S. District Judge Jennifer A. Dorsey  
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26 <sup>48</sup> ECF No. 20-17 at 4–5 (citing *Kirksey v. State*, 923 P.2d 1102, 1114 (Nev. 1987) (“It is  
27 appellant’s responsibility to present relevant authority and cogent argument; issues not so  
presented need not be addressed by this court.”)).

28 <sup>49</sup> *Cullen*, 563 U.S. at 182.